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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78- 600

DONALD E. PERCY, Secretary,
WISCONSIN DEPARTMENT OF
HEALTH AND SOCIAL SERVICES,
Petitioner,

v.

RONALD FRANCIS TERRY a/k/a
BARBARA LYNN TERRY
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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October 10, 1978

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IN THE
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No. 78-

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RONALD FRANCIS TERRY a/k/a
BARBARA LYNN TERRY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

The petitioner respectfully prays that a writ of certiorari be issued to review the opinion of the Supreme Court of Wisconsin in the litigation here in question.

OPINION BELOW

The opinion of the Supreme Court of Wisconsin is reported, as amended, as *State ex rel. Terry v. Percy*, 84 Wis.2d 693, 267 N.W.2d 380 (1978). This decision followed remand by this court in *Percy v. Terry*, 434 U.S. 808 (1977). This court vacated an earlier decision by the Supreme Court of Wisconsin reported *sub. nom. State ex rel. Terry v. Schubert*, 74 Wis.2d 487, 247 N.W.2d 109

(1976). A reproduction of all these decisions is printed in the Appendix (App. 101-129).

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. sec. 1257(3). The judgment of the Supreme Court of Wisconsin was entered June 30, 1978.

QUESTION

When a state statute provides for a periodic review by the custodial department of treatment orders for criminally convicted and adjudged sex deviates, including review of the need for continued commitment, must such review be accorded at a hearing conducted with the due process requirements of *Morrissey v. Brewer*?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article XIV of the Amendments to the United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Wisconsin Statutes 1975:

> **"975.09 Periodic examination.** The department shall make periodic examinations of all persons within its control under s. 975.06 for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. These examinations may be made as frequently as the department considers desirable and shall be made with respect to every person at intervals not exceeding one year. The department shall keep written records of all examinations and of conclusions predicated thereon, and of all orders concerning the disposition or treatment of every person under its control. Failure of the department to examine a person committed to

it or to make periodic examination shall not entitle him to a discharge from the control of the department, but shall entitle him to petition the committing court for an order of discharge, and the court shall discharge him unless it appears in accordance with s. 975.13 that there is necessity for further control."

"975.11 Duration of control. The department shall keep every person committed to it under s. 975.06 under its control and shall retain him, subject to the limitations of s. 975.12 under supervision and control, so long as in its judgment such control is necessary for the protection of the public. The department shall discharge any such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public, but no person convicted of a felony shall, without the written approval of the committing court, be discharged prior to 2 years after the date of his commitment."

STATEMENT OF THE CASE

Ronald Francis Terry a/k/a Barbara Lynn Terry, hereinafter referred to as respondent, was found guilty of two counts of rape, contrary to Wis. Stat. sec. 944.01 (1971), and one count of theft, contrary to Wis. Stat. sec. 943.20(1)(a) and (3)(d)(2) (1971), on February 24, 1971. After the mandatory presentence commitment required for convicted rapists, respondent was committed as a sex deviate on June 29, 1971. This commitment is labelled as indeterminate, but must be renewed at the end of the maximum term for the crime, and every five years thereafter Wis. Stat. sec. 975.12(1) (App. 134).

Respondent petitioned the Circuit Court for the Thirteenth Judicial Circuit of Wisconsin for habeas corpus relief, alleging that respondent was no longer in need of sex deviate treatment.[1] The custodian responded. The circuit court rejected the assertions of court appointed counsel for respondent that the Wisconsin statutes denied respondent due process of law or the equal protection of the laws. The circuit court, however, dismissed the writ proceedings on separate grounds, raised *sua sponte*, that the court lacked jurisdiction.

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[1] Respondent's habeas corpus petition named his then custodian, Edward Schubert. Donald E. Percy, Secretary of the Wisconsin Department of Health and Social Services, brings this petition to the Court because Terry is no longer in an institution, but rather is on parole, in the custody of the department. Respondent is supervised by employees of the department other than Schubert. The fact of parole, however, does not moot this case, since the Supreme Court of Wisconsin's ruling applied to sex deviate parolees also.

From the order of dismissal the respondent appealed to the Supreme Court of Wisconsin. The respondent raised all three issues in the supreme court. That court reversed the jurisdictional basis of the circuit court's decision. Notwithstanding that reversal, the court resorted to declaratory relief as to the equal protection and due process claims,/2 affirming the circuit court finding that equal protection was not denied.

The Supreme Court of Wisconsin reversed the due process of law decision of the circuit court, holding that the state could not constitutionally continue an involuntary commitment without due process of law under *O'Connor v. Donaldson*, 422 U.S. 563 (1975). The court then examined the available statutes and noted that under Wis. Stat. sec. 975.09, the department must provide yearly review of the treatment of sex deviate commitments. The court decreed that these periodic examinations must henceforth comport with the procedural requisites of *Morrissey v. Brewer*, 408 U.S. 471 (1972).

The Secretary sought this court's writ of certiorari. This court granted its writ of certiorari, vacated the judgment of the Supreme Court of Wisconsin, and remanded to that court "to consider whether its judgment [was] based upon federal or state constitution grounds, or both." *Percy v. Terry*, 434 U.S. 808 (1977).

The Supreme Court of Wisconsin adjudged that its earlier decision was "based upon the fourteenth amendment to the federal constitution." *State ex rel. Terry v. Percy*, 84 Wis.2d 693, 267 N.W.2d 380 (1978). The court stated it "acted solely by compulsion of the fourteenth amendment." 84 Wis.2d at 697, 267 N.W.2d at 382.

/2 This procedure is peculiarly of state origin and is not here challenged.

Petitioner again seeks this court's Writ of Certiorari for review of the Supreme Court of Wisconsin's resolution of the Due Process of Law claim.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Of Constitutional Law, The Resolution Of Which This Court Has Previously Reserved From Judgment.

The Supreme Court of Wisconsin has determined, on the basis of this Court's decisions, that a sex deviate adjudged in need of specialized treatment must receive a review of the sex deviate commitment at which the custodial department must establish the need for continuation of the commitment. In reaching this decision, the Supreme Court of Wisconsin erroneously determined that this Court's decisions require that criminally convicted and adjudged sex deviates may not be continued in an involuntary commitment without being heard on the continued need for commitment. The Supreme Court of Wisconsin compounded that error with the equally erroneous determination that the proceeding it deemed to be the appropriate vehicle for the sex deviate to be heard must provide that individual with the due process requirements of *Morrissey v. Brewer*.

A. The Supreme Court of Wisconsin erroneously extended O'Connor v. Donaldson to commitments following conviction for crime and determination of sexual deviancy.

The respondent, Terry, a convicted criminal defendant, was found in need of specialized treatment as a sex deviate

pursuant to Wis. Stat. sec. 975.04 (App. 129).[3] He was committed pursuant to Wis. Stat. sec. 975.06 (App. 130). The sex deviate commitment lasts until discharge, Wis. Stat. sec. 975.11, and thus may be labelled as indeterminate. Nevertheless, once a period of time equal to the maximum prison term for the offense has transpired, the department must petition a court for recommitment. Wis. Stat. sec. 975.12(1) (App. 134). The maximum penalty for Terry's crimes was thirty years.[4]

The Supreme Court of Wisconsin read *O'Connor v. Donaldson* and *Jackson v. Indiana*, 406 U.S. 715 (1972), as requiring that a sex deviate have a hearing to determine the continued need for the sex deviate commitment. That requirement was engrafted upon Wis. Stat. sec. 975.09, which provides periodic review of the commitment by the department, irrespective of whether the deviate was in an institution or on parole.[5]

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[3] This Court has previously reviewed the Wisconsin Sex Crimes Act. See *Humphrey v. Cady*, 405 U.S. 504 (1972). The procedures described there, 405 U.S. at 507, are similar to present practice. Now, however, commitment requires jury trial, Wis. Stat. sec. 975.06, as does recommitment, Wis. Stat. sec. 975.14.

[4] Terry was convicted of two counts of rape, but his commitment was concurrent on both. The maximum term for rape is thirty years. Additionally, Terry received a five year prison sentence, also concurrent, for theft.

[5] Terry was paroled during the lower court litigation, pursuant to Wis. Stat. sec. 975.10 (set forth at App. 133). This parole does not moot this case because Terry remains under the custody of the department and, therefore, he is entitled to periodic examination under Wis. Stat. sec. 975.09, although on parole.

In so holding, the Supreme Court of Wisconsin misapplied *O'Connor v. Donaldson*. In *O'Connor*, this Court held that a state may not confine involuntarily the mentally ill without finding a need for protection of the individual or without finding that the individual is dangerous to others. The Supreme Court of Wisconsin extended *O'Connor* to require the State to provide a process for sex deviates to challenge the need for continued involuntary commitment.

This Court reserved ruling on this issue in *O'Connor v. Donaldson*. This Court said, at 573-574:

> "We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person--to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness. *Jackson v. Indiana*, 406 U.S. 715, 736-737; *Humphrey v. Cady*, 405 U.S. 504, 509."

Wisconsin law provides two means to terminate the sex deviate commitment: the passage of time, Wis. Stat. sec. 975.12(1) (not greater than the maximum term for the underlying crime) and periodic examination by the department under Wis. Stat. sec. 975.09. Neither statute requires a hearing, yet the Supreme Court of Wisconsin held that *O'Connor* requires a hearing. This hearing was to become the periodic examination called for in Wis. Stat. sec. 975.09 and was to be held yearly.

This holding was an erroneous interpretation of constitutional law; *O'Connor v. Donaldson* explicitly declined to reach that issue. This reading of *O'Connor* was erroneous for the additional reason that, unlike the civil involuntary commitment for mental illness involved in *O'Connor*, the sex deviate commitment follows both criminal conviction and a judgment of sexual deviancy.

B. The Supreme Court of Wisconsin erroneously held that the process due a sex deviate to challenge his treatment and continued commitment must comport with Morrissey v. Brewer, notwithstanding a statute that sets forth the department's obligations.

In determining the process due to decide whether respondent should be restored of his liberty or otherwise treated, the Supreme Court of Wisconsin engrafted the procedural requisites of *Morrissey v. Brewer*, upon the provisions of Wis. Stat. sec. 975.09. Wis. Stat. sec. 975.09 calls for yearly "review" by the custodial department to determine if "existing orders and dispositions should be modified or continued." The term "orders and dispositions" refers to department treatment determinations and the continued need for specialized treatment. Should the department fail to provide the examination at least yearly, the sex deviate may petition the committing court for release. The department must then establish public dangerousness in a judicial form. Failure to establish public dangerousness results in release.

There can be no question but that the periodic examination established in Wis. Stat. sec. 975.09 requires the department to assess and evaluate the treatment offered and, indeed, even the continued need for

treatment. Treatment modifications can include change of facilities, change of method of treatment, change in need to be in an institution,[6] treatment on an out-patient basis in a community based facility, and the like.

Wis. Stat. sec. 975.11 creates a limited interest. That interest, however, requires no more than a determination by the department, pursuant to Wis. Stat. sec. 975.09 as to the deviate may be released without danger to the public. The interest created thereby is not of a character such as probation or release on parole. Those interests require "cause" to terminate, because the individual has already been provided actual freedom from confinement. Rather the interest is merely the right to receive a review of treatment by the custodial department. Cf. *Bishop v. Wood*, 426 U.S. 341 (1976). Wis. Stat. sec. 975.09 calls for a subtle, intricate, and incredibly complex balancing of available treatment, response to treatment, attitude of the sex deviate, cooperation, and other factors. Is there an ongoing treatment program? Is the deviate participating? Can the program be altered? What responses has the deviate made? Has the deviate initiated any attempt to help himself? Has the deviate refused any programs? Why is he refusing? Clearly, the calculus of liberty under Wis. Stat. sec. 975.11 does not call for the determination of "cause" identified in *Morrissey v. Brewer*.

It was thus palpably improper to require that the procedures of *Morrissey v. Brewer*, procedures peculiarly appropriate to the nearly adversarial determination of "cause" in the revocation process, be superimposed upon a

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[6] Under Wis. Stat. sec. 975.10 (App. 133), sex deviates may be paroled. Respondent was paroled. This parole function, however, is distinct from the periodic examination. The results of the periodic examination, in practice, are considered by the Special Review Board, but periodic examination decisions calling for parole are not necessarily rubber-stamped.

treatment decision. The Supreme Court of Wisconsin believed *Morrissey v. Brewer* required that result. This was error.

This case presents the legal issue reserved by this Court in *O'Connor v. Donaldson* as to when and by what procedures a sex deviate may challenge his commitment. This Court ought to grant certiorari review to resolve these important federal questions.

> *C. Resolution of the process due a criminally convicted and adjudged sexual deviate, who by statute is to be released when the custodial department finds a reasonable probability he can be released without danger to the public, presents an important predicate to resolving what process, if any, is due in parole grant decision-making.*

The Supreme Court of Wisconsin stated that the interest of a criminally convicted and adjudged sexual deviate "in release from commitment, once the basis for that commitment no longer exists, is clearly a valuable one, the determination of which calls for some orderly procedure." *State ex rel. Terry v. Schubert*, 74 Wis.2d at 497, 247 N.W.2d at 114. The decision was reached "solely by compulsion of the fourteenth amendment of the federal constitution."

This court is thus squarely presented with what procedure is required after the state has deprived an individual of his liberty by a valid judgment of conviction and has by statute created an opportunity for liberty when in the judgment of the state that individual is ready for release.

Although this case presents the issue in the context of a discharge from a commitment without further supervision, consideration of the process due a sex deviate under Wis. Stat. sec. 975.11 is similar to the considerations in determining what process is due a prison inmate in the parole grant decision.[7] See, for example, Va. Code Ann. § 53-253 (1974).[8] *Franklin v. Shields*, 569 F.2d 784 (4th Cir. 1977), cert. den. 435 U.S. ____ (1978). Both groups of inmates have been deprived altogether of their liberty except as to those liberties the state, by statute, may have returned to them. Cf. *Meachum v. Fano*, 427 U.S. 215, 224 (1976). In both situations, state legislatures have created statutes authorizing release: for Wisconsin sex deviates, the release is total, Wis. Stat. sec. 975.11; for parolees, the release is generally to some form of supervision under conditions. In both situations, the

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[7] The process due, if any, in the parole grant decision-making is an issue which has evaded this court's review repeatedly. See *Scarpa v. United States Board of Parole*, 477 F.2d 278 (5th Cir. 1978) (*en banc*), vacated and remanded to consider mootness, 414 U.S. 809 (1973), dismissed as moot, 501 F.2d 992 (5th Cir. 1973); *United States ex rel. Johnson v. Chairman, New York State Board of Parole*, 500 F.2d 925 (2nd Cir. 1974), vacated as moot *sub nom. Regan v. Johnson*, 419 U.S. 1015 (1974); *Weinstein v. Bradford*, 423 U.S. 147 (1975) (dismissed as moot); *Scott v. Kentucky Parole Board*, 429 U.S. 60 (1976) (vacated and remanded to consider mootness), dismissed as moot for one petitioner, but not the other, 556 F.2d 805 (6th Cir. 1977), cert. den. 434 U.S. 960 (1977). Only last term this court dismissed another case, touted as raising the issue, on the basis that the writ of certiorari was improvidently granted. *New York State Parole Board v. Coralluzzo*, 435 U.S. 912 (1978).

[8] Va. Code Ann. § 53-253 (1974):

> "*Thorough investigation prior to release.*—No person shall be released on parole by the Board until it has made, or caused to be made, a thorough investigation as to the history, the physical and mental condition, and the character of the prisoner and his conduct, employment and attitude while in prison, nor until the Board has determined that his release on parole will be compatible with the interests of the prisoner and of society."

legislative standard calls for the state to exercise its discretion to determine if discharge or parole release is appropriate.

The similarity between parole grant statutes and Wis. Stat. sec. 975.11 is that the statutes hold out the carrot of greater or total liberty once the state has been convinced that the inmate is appropriate for such increased or total liberty. Wis. Stat. sec. 975.11 is illustrative of the point.

The second sentence of the statute assures discharge upon the occurrence of a condition precedent: that the department, in its opinion, believes the sex deviate may be given full liberty *"without danger to the public."* The phrase "without danger to the public" is decidedly different from requiring the department to prove that the sex deviate remains dangerous. Rather, "without danger to the public" creates a standard requiring proof from the sex deviate, established by his accomplishments and efforts, that he is no longer suffering the abberation for which he was committed.

This standard was deliberately created by the legislature as part of a statutory scheme to deal with a special class of criminals: those whose crimes were the result of sexual deviancy. The legislature placed adjudged sex deviates in the department's control. This control was to continue (unless discharged because the department reached the opinion full liberty could be restored "without danger to the public") until the chronological occurrence of the greater of one year or the maximum term for the crime committed. Wis. Stat. sec. 975.12(1).

Additionally, the department was to retain the sex deviate under supervision and control as long as necessary to protect the public. This direction to retain the sex

deviate includes housing in an institution, but additionally incorporates "supervision" such as results from parole granted under Wis. Stat. sec. 975.10.

The statutory scheme also requires the department to periodically examine the sex deviate to determine if the then existing orders and dispositions are appropriate. Wis. Stat. sec. 975.09. During the review, the department may consider a number of factors, including a program participation, willingness to accept treatment, need for treatment, whether a treatment is medically or scientifically available.

Wis. Stat. sec. 975.09 places a penalty of sorts upon the department if it does not conduct an annual examination of the sex deviate. If no examination is held, the sex deviate may petition the committing court for discharge. At the hearing on such petition, the department's burden is much higher than "without danger to the public." Rather, the department must prove continuing dangerousness, just as it would be required to prove were the department seeking an extension of commitment following the chronological end of the term. Cf. Wis. Stat. secs. 975.13, 975.14.

Thus, these statutes rather clearly create a unit of legislation. These statutes must be viewed as a whole when ascertaining the character of the interest created in only one part of the statutes. The interest created by the legislature conditions discharge upon the department reaching the opinion that the deviate may be released "without danger to the public." This condition places a heavy burden on the department not to discharge the deviate unless it has proof of non-dangerousness to the public.

In making the decisions required of it under the Sex Crimes Act, the department must balance many factors that are not susceptible to quantitative proof. The release

decision is more than concluding that available institution treatment or out-patient therapy has been successfully negotiated. "Without danger to the public" includes the ability to successfully reintegrate into society without experiencing the underlying strains of free world life that may have triggered the deviates abberation into criminal action at a prior time.

The release decision is not the end product of a search for accurately determined facts by the combat of direct and cross-examination. The decision is not one in which the department must prove the deviate is inappropriate for release. The decision is not one readily susceptible to notice of the proceedings and disclosure of evidence to be relied upon.

The Supreme Court of Wisconsin's invocation of procedures virtually patterned upon *Morrissey v. Brewer* was plainly erroneous.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and decision of the Supreme Court of Wisconsin.

Respectfully submitted,

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No. 75-503
August Term, 1977
STATE OF WISCONSIN : IN SUPREME COURT

STATE EX REL. BARBARA LYNN TERRY,
Petitioner-Appellant,
v.
EDWARD F. SCHUBERT,
Respondent.

ON REMAND from the United States Supreme Court. *By the Court: State ex rel. Terry v. Schubert*, 74 Wis.2d 487, 247 N.W.2d 109 (1976), is based upon the fourteenth amendment to the federal constitution. That decision is reinstated in its entirety as filed and modified.

PER CURIAM. On November 30, 1976, in a published opinion, *State ex rel. Terry v. Schubert*, 74 Wis.2d 487, 247 N.W.2d 109 (1976), this court reviewed an order and judgment of the circuit court for Dodge county which dismissed the writ of habeas corpus by which petitioner Terry sought a discharge from a commitment under ch. 975, Stats., the Wisconsin Sex Crimes Act. The judgment of this court reads as follows:

> "Affirmed in part; reversed in part; remanded for entry of order consistent with the declaration of rights as per decision herein and ordering respondent to provide petitioner within a reasonable time a hearing under Sec. 975.09, Stats., which meets the procedural requirements contained herein."

Thereafter the Secretary of the Department of Health and Social Services petitioned the United States Supreme

Court for a writ of certiorari to review this court's judgment. By order dated November 3, 1977, the Supreme Court granted the petition, and ordered that the judgment of the Supreme Court of the State of Wisconsin be vacated and that the "cause be remanded to the Supreme Court of the State of Wisconsin to consider whether its judgment is based upon federal or state constitutional grounds, or both. *See California v. Krivda*, 409 U.S. 33 (1972)." *Percy v. Terry*, ____ U.S. ____, 98 S.Ct. 40 (1977).

Upon receiving the remand order from the United States Supreme Court, we issued an order vacating our judgment of November 30, 1976, directing the Circuit Court for Dodge County to return the record on appeal, and establishing a briefing schedule.

The facts involved in this case were set forth in our original opinion and need not be repeated in detail at this time. Terry was convicted of two counts of rape and one count of theft. Pursuant to the recommendation of the Department of Health and Social Services that Terry was in need of specialized treatment as a sex deviate, the trial court ordered him committed to the department under sec. 975.06, Stats. Terry received an indeterminate five-year sentence on the theft conviction, to be served concurrently with the commitment.

After serving approximately three years at the Wisconsin State Prison, Terry was transferred to Central State Hospital. Sec. 975.08(2), Stats. Subsequent to the mandatory release date on his theft conviction, Terry commenced a habeas corpus proceeding, alleging that he was not suffering mental aberrations due to sexual psychopathy and that continuing his confinement violated his rights.

Sec. 975.11, Stats., provides that the department shall discharge any person committed to it under the Sex Crimes Act "as soon as in its opinion there is a reasonable probability that he can be given full liberty without danger to the public. . . ." Terry challenged the constitutionality of the procedures provided to review commitment between the time of initial commitment and the expiration of the maximum term of confinement. Sec. 975.09, Stats., provides as follows:

> "The department shall make periodic examinations of all persons within its control under s. 975.06 for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. These examinations may be made as frequently as the department considers desirable and shall be made with respect to every person at intervals not exceeding one year. The department shall keep written records of all examinations and of conclusions predicated thereon, and of all orders concerning the disposition or treatment of every person under its control. Failure of the department to examine a person committed to it or to make periodic examination shall not entitle him to a discharge from the control of the department, but shall entitle him to petition the commiting court for an order of discharge, and the court shall discharge him unless it appears in accordance with s. 975.13 that there is necessity for further control."

The trial court dismissed Terry's petition on the ground that it lacked jurisdiction to consider the mental status or treatment needs of one committed as a sex offender during the course of the commitment. The petitioner appealed.

In *State ex rel. Terry v. Schubert*, 74 Wis.2d 487, 247 N.W.2d 109 (1976), this court noted that the department "has shown no formalized procedures which are followed in the periodic examination provided by sec. 975.09." 74 Wis.2d at 496. We concluded that the sex offender's "interest in release from commitment, once the basis for that commitment no longer exists, is clearly a valuable one, the determination for which calls for some orderly procedure." 74 Wis.2d at 497. We held that the following minimal due process rights are applicable to the periodic examination procedures provided by sec. 975.09, Stats.:

> ". . . (1) written notice of the hearing; (2) disclosure of the evidentiary material which will be considered by the hearing body; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses, in the absence of good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the factfinders as to the evidence relied on and the reasons for refusing parole or discharge. *Morrissey v. Brewer, supra* [408 U.S. 471] at 489." 74 Wis.2d at 502a-502b.

The decision of the department is reviewable by the committing court on certiorari. *Id.* at 498.

The issue on remand is whether the judgment of this court is based upon federal or state constitutional grounds, or both.

Pursuant to the mandate of the United States Supreme Court hereinabove quoted, we have reexamined our opinion in the subject case, have read the briefs filed by the parties and amicus curiae, and have reviewed the record. In reaching our initial decision we acted solely by compulsion of the fourteenth amendment of the federal constitution. Inasmuch as we deem it unnecessary to alter or amend our prior decision, we reiterate and reinstate that decision in its entirety as filed and modified.

SHIRLEY S. ABRAHAMSON, J. (*concurring*). Given this opportunity to review our prior decision, I would base the decision on both the federal constitution and the Wisconsin statutes and constitution. While it is my view that the same conclusion is reached under the fourteenth amendment as under chapter 975 and section 1, article I of the Wisconsin Constitution, I believe we are in any event independently constrained to the result we reached by the Wisconsin statutes and constitution.

Terry and the State both concede that sec. 975.11, Stats., creates a liberty interest benefitting the committee and warranting federal constitutional protection. *See Meachum v. Fano*, 427 U.S. 215, 226, 229 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In our prior decision we concluded that a person committed under ch. 975 has a liberty interest based on the Wisconsin statutory mandate that he shall be discharged "as soon as in its [the department's] opinion there is a reasonable probability that he can be given full liberty without danger to the public." Sec. 975.11, Stats. The statutes require the department to review the progress and status of the

commitee, *e.g.*, sec. 975.09, Wis. Stats., and in our prior decision we concluded that the determination whether to continue commitment "calls for some orderly procedure." 74 Wis.2d at 497.

Art. I, sec. 1 of the state constitution provides as follows:

> "All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed."

This section has been viewed by this court as "substantially the equivalent of the due process and equal protection clauses of the 14th amendment of the U.S. Const. . . . ." *Buse v. Smith*, 74 Wis.2d 550, 579, 247 N.W.2d 141 (1976). *See Chicago & N. W. Ry. v. La Follette*, 43 Wis.2d 631, 636, 169 N.W.2d 441 (1969); *State ex rel. Sonneborn v. Sylvester*, 26 Wis.2d 43, 49, 132 N.W.2d 249 (1965). Although the federal and state guarantees may be substantially equivalent, this court is not bound to give the Wisconsin Constitution the same interpretive scope as that the United States Supreme Court gives the fourteenth amendment. We have said that "it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court under the Fourteenth Amendment. . . . This court has never hesitated to do so." *State v. Doe*, 78 Wis.2d 161, 171, 254 N.W.2d 210 (1977). *See also State v. Taylor*, 60 Wis.2d 506, 522, 210 N.W.2d 873 (1973); *State v. Wallace*, 59 Wis.2d 66, 79, 207 N.W.2d 855 (1973).

I would rest our decision on the state statutes and the state constitution, as well as the federal constitution, because the Wisconsin legislature has provided detailed commitment and release procedures for sex crime offenders and other commitees, *e.g.*, secs. 51.20; 51.37; 971.14(2), (4), and (5), and 971.17, Wis. Stats., and because this court has interpreted these statutes, taking into consideration the interests of the commitee and of the public, to assure meaningful procedural safeguards.

On numerous occasions, this court has demonstrated its commitment to fair administrative procedures. *See e.g., State ex rel. Matalik v. Schubert*, 57 Wis.2d 315, 326-27, 204 N.W.2d 13 (1973); *State ex rel. Haskins v. Dodge County Court*, 62 Wis.2d 250, 262, 214 N.W.2d 575 (1974); *State ex rel. Kovach v. Schubert*, 64 Wis.2d 612, 622-23, 219 N.W.2d 341 (1974), *cert. denied* 419 U.S. 1130 (1975); *State ex real. Gebarski v. Milwaukee County Circuit Court*, 80 Wis.2d 489, 491, 259 N.W.2d 531 (1977). This court required that a separate sex crimes commitment hearing be held after conviction prior to the United States Supreme Court's imposing the same requirement. *Cf. Huebner v. State*, 33 Wis.2d 505, 147 N.W.2d 646 (1967), *with Specht v. Patterson*, 386 U.S. 605 (1967). The court more recently held that a sex offender was entitled to a jury determination at the initial commitment hearing as well as at the recommitment hearing following expiration of the criminal term. *State ex rel. Farrell v. Stovall*, 59 Wis.2d 148, 207 N.W.2d 809 (1973).

Sec. 975.09, Stats., requiring periodic examinations of the sex offender and requiring the department to keep written records of all examinations and conclusions predicated thereon, is one of many statutes designed to protect the public from harm from the criminal and to protect the commitee from being unjustly institutionalized. The procedures this court has mandated in its decision are necessary to implement in a meaningful way

the legislative mandate of periodic examinations and to assure that persons committed under ch. 975 will be institutionalized as long as necessary to their own good and that of the public, but no longer.

The federal constitution assures all persons minimum procedural rights. State laws and the state constitution can afford additional protections to persons within their boundaries. As Mr. Chief Justice WARREN E. BURGER recently observed,

> "In our own time, and in very recent opinions of the [United States] Supreme Court, there are frequent references to the importance of allowing states to experiment and innovate, precisely so that no monolithic, universal system of justice would prevail. The states have far more flexibility their legislatures are closer to the people and their judges are closer to the people and their problems." Burger, *To Weaken our State Courts is to Destroy Federalism*, 17 Judges' Journal 11, 12 (1978).

I view procedural rights of commitees under ch. 975 as an area of the law in which national uniformity is not required and in which each state can formulate procedures to suit its individual needs. I would therefore base our decision on both the federal constitution and the state statutes and state constitution.

I am authorized to state that Mr. Justice Heffernan joins in this concurring opinion.

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, July 24, 1978

The Court today announced an order in your case as follows:

No. 75-503 *State ex rel. Barbara Lynn Terry v. Edward F. Schubert*

The court having considered the respondent's July 6, 1978 motion to recaption the decision and to stay this court's mandate pending respondent's application for certiorari to the Supreme Court of the United States,

IT IS ORDERED that the case be recaptioned State ex rel. Barbara Lynn Terry v. Donald E. Percy; and

IT IS FURTHER ORDERED that the motion for a stay is denied.

Marilyn L. Graves
Clerk of Supreme Court

No. 75-503
August Term, 1976
STATE OF WISCONSIN : IN SUPREME COURT

State ex rel. Barbara Lynn Terry,
Petitioner-Appellant,
v.
Edward F. Schubert,
Respondent.

APPEAL from a judgment and an order of the circuit court for Dodge county: HON. HENRY G. GERGEN, JR., Circuit Judge. *Affirmed in part; reversed in part, with directions consistent with this opinion.*

This appeal is from an order and judgment which dismissed petitioner's writ of habeas corpus seeking a discharge from a commitment under ch. 975, Stats., the Wisconsin Sex Crimes Act and denied two motions by the petitioner made in conjunction with the writ.

On February 24, 1971, petitioner was convicted of two counts of rape, contrary to sec. 944.01, Stats., and one count of theft, contrary to sec. 943.20(1)(a), (3)(d)2, Stats. Pursuant to sec. 975.01, Stats., the court ordered the Department of Health and Social Services to make a presentence social, physical, and mental examination of petitioner. The department concluded petitioner was in need of specialized treatment as a sex deviate, and pursuant to that recommendation, the trial court ordered petitioner committed to the department under sec. 975.06, Stats. On the theft conviction, petitioner was sentenced to an indeterminate term of not more than five years to be served concurrent with the commitment.

Petitioner was incarcerated at the state prison in Waupun until February 14, 1974, when he was transferred, pursuant to sec. 975.08(2), Stats., to Central State Hospital.

Petitioner commenced this habeas corpus proceeding on October 29, 1974, subsequent to the mandatory release date for the sentence on the theft conviction, alleging that he is not suffering from any mental abberations due to sexual psychopathy, and therefore the respondent, superintendent of Central State Hospital, is violating the petitioner's rights by failing to discharge him of his commitment. In conjunction with this writ petitioner made a motion for a jury determination as to whether he should remain confined and a motion for a court-appointed physician.

The trial court dismissed the petition on the ground that it was without jurisdiction to consider the mental status or need for treatment of a person committed under ch. 975, Stats., during the course of that person's commitment. Accordingly, petitioner's motions were denied. Petitioner appeals.

HANLEY, J. Three issues are presented on this appeal:

1. Is habeas corpus the proper remedy to challenge the continuing nature of a commitment under ch. 975, Stats.?

2. Do the present procedures for determination of whether a person committed under ch. 975, Stats., should be discharged from that commitment provide sufficient due process protections for persons so committed?

3. Are persons committed under ch. 975, Stats., denied equal protection in that judicial review is provided for reexamination of other types of commitments?

Habeas Corpus

In this case the trial court held that habeas corpus is not available to one who has been committed under ch. 975, Stats., the Wisconsin Sex Crimes Act. The rationale for so holding is that, although sec. 292.01(2), Stats., provides for judicial determination of the "question of mental illness or need for treatment" upon a petition for a writ of habeas corpus by a person who is confined in an institution as mentally ill, that section only applies to persons committed in civil proceedings, and where one is committed in a criminal proceeding only the committing court may conduct judicial review. In support of this position, it is noted that under sec. 975.11, Stats., no commitee [*sic*] convicted of a felony may be discharged prior to two years after the date of his commitment without written approval of the committing court.

Assuming, arguendo, that sec. 292.01(2) is limited to persons committed in civil proceedings, the right to habeas corpus is guaranteed by both the United States Constitution and the Wisconsin Constitution, cannot be denied a petitioner who inquires into the legal authority for his detention [*sic*]. The fact that the pro se petition in this case specifically referred to sec. 292.01(2) should not serve to limit petitioner's remedy. It should be noted that sec. 292.01(1), Stats., very generally provides the right to prosecute a writ of habeas corpus to "every person restrained of his liberty."

In this case, also, no approval of the commiting court is necessary as petitioner has been committed for five years. Furthermore, the rationale that only the committing court may make judicial review of commitments in criminal proceedings cannot carry great weight where the petitioner's basic contention is that he is denied review by any court. He claims that he is unconstituionally deprived

of due process and equal protection in the opportunity to obtain release from confinement. This is, in effect, a challenge to the legality of that confinement.

This court has consistently held that claims of constitutional error may be reviewed by means of a writ of habeas corpus. *Babbit v. State*, 23 Wis.2d 446, 452, 127 N.W.2d 405, 409 (1964); *Servonitz v. State*, 133 Wis. 231, 113 N.W. 277 (1907). The scope and purpose of the writ of habeas corpus have been expanded to review violations of the constitutional rights of persons confined by the state in correctional institutions. *State ex. rel. Terry v. Traeger*, 60 Wis.2d 490, 498-99, 211 N.W.2d 4, 9 (1973); *State v. Kanieski*, 30 Wis.2d 573, 576-77, 141 N.W.2d 196, 198 (1966). Here the petitioner does not question the validity of the commitments as originally imposed; therefore, a post-conviction motion pursuant to sec. 974.06, Wis. Stats., is not available to petitioner.

Furthermore, in other actions commenced by petitions for writs of habeas corpus of persons committed under laws of this state, this court has made declarations of constitutional rights regarding procedures for original commitment and reexamination, even though the court's decision did not result in the immediate discharge from custody. *State ex rel. Kovach v. Schubert*, 64 Wis.2d 612, 219 N.W.2d 341 (1974) (commitment following acquittal by reason of insanity); *State ex rel. Farrell v. Stovall*, 59 Wis. 2d 148, 207 N.W.2d 809 (1973) (commitment under Sex Crimes Act); *State ex rel. Matalik v. Schubert*, 57 Wis.2d 315, 204 N.W.2d 13 (1973) (commitment upon determination of incompetency to stand trial). Thus, in this case, where the commitee [*sic*] claims he is denied constitutional rights for review of his commitment, his claim is essentially that he is illegally detained by the state, and a court may properly declare rights upon a petition for a writ of habeas

corpus, even though a determination favorable to the petitioner may not result in the immediate discharge from custody.

From the above analysis we conclude that the trial court erred in holding that it was without jurisdiction to consider petitioner's claims. This conclusion would indicate that the case should be remanded to the trial court so that it may consider these claims. However, the written decision of the trial court shows that determinations were made as to the validity of petitioner's contentions with respect to due process and equal protection, and thus, this court may properly consider these contentions.

Due Process

Secs. 975.01 and 975.02, Stats., mandate a presentence social, physical and mental examination upon conviction of specified sex crimes and permit such examinations, in the court's discretion, upon conviction of any sex offense not specified in 975.01. If after this examination, the department recommends specialized treatment for the defendant's mental or physical abberations, the court shall order a hearing on the issue of the need for specialized treatment. Sec. 975.06(1), Stats. Upon a determination that the defendant is in need of specialized treatment, the court shall commit him to the department. Sec. 975.06(2), Stats. This commitment to the department practically amounts to a sentence of the maximum term for the crime committed by the defendant. At the expiration of the maximum term the department must discharge the person committed, unless control is continued pursuant to recommitment procedures under sec. 975.13, Stats.

The Sex Crimes Law has given rise to a number of challenges regarding the guarantee of the rights of due process and equal protection of those persons subject to its

provisions. In *Huebner v. State*, 33 Wis.2d 505, 147 N.W. 2d 464 (1967), this court held that a full judicial hearing was required at the initial commitment proceeding on the presentence report under the Sex Crimes Act. In accordance with the *Huebner* decision, sec. 975.06(1), Stats., now provides:

> "The defendant shall be afforded the opportunity to appear with counsel; process to compel attendance of witnesses and the production of evidence; and a physician, or clinical psychologist of his own choosing to examine him and testify in his behalf. If he is unable to provide his own counsel or expert witness, the court shall appoint such to represent or examine him."

In *State ex rel. Farrell v. Stovall, supra*, the holding of *Huebner* was expanded to require the right to a six-person jury trial, on demand, at both the initial commitment hearing and the recommitment hearing after the maximum term has expired. In this case, petitioner asks the court to consider the constitutionality of the procedures provided to review commitment between the time of initial commitment and the expiration of the maximum term of incarceration.

The statutes provide that the department shall discharge any person committed to it under the Sex Crimes Act "as soon as in its opinion there is a reasonable probability that he can be given full liberty without danger to the public. . . ." Sec. 975.11, Stats. Two procedures for this sort of determination are provided. One of these procedures is through departmental examination under sec. 975.09, Stats., which provides:

> "The department shall make periodic examinations of all persons within its control under s. 975.06 for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. These examinations may be made as frequently as the department considers desirable and shall be made with respect to every person at intervals not exceeding one year. The department shall keep records of all examinations and of conclusions predicated thereon, and of all orders concerning the disposition or treatment of every person under its control. Failure of the department to examine a person committed to it or to make periodic examination shall not entitle him to a discharge from the control of the department, but shall entitle him to petition the committing court for an order of discharge, and the court shall discharge him unless it appears in accordance with s. 975.13 that there is necessity for further control."

The other procedure for review is through the special review board provided for in sec. 975.10, Stats.:

> "Any person committed as provided in this chapter may be paroled if it appears to the satisfaction of the department after recommendation by a special review board, appointed by the department, a majority of whose members shall not be connected with the department, that he is capable of making an acceptable adjustment in society."

The record fails to disclose any information regarding the procedure which is followed for periodic examination by the department under sec. 975.09. The procedure before the special review board is only a little more discernible. The respondent states that procedure before this board has recently been modified to provide notice to the individual of the hearing, of the standards and criteria which will be considered, and of his right to present relevant materials for the board's consideration. He is to receive a packet containing the file documents which the board will consider and a written decision including the reaons [*sic*] for any disposition. Respondent states that these new procedures are the result of this court's decision in *State v. Goulette*, 65 Wis.2d 207, 222 N.W.2d 622 (1974), which held that the common law concepts of due process and fair play apply to parole hearings of the regular parole board. Whether or not these procedures before the special review board are actually provided is not of record, and it appears that they have not been adopted in any formalized manner. Two features of the procedures of the special board, which we think are critical, must be pointed out. One, the statutes make no requirement that the special review board perform its function on any periodic basis, as for example, once per year. Two, the decision of the special review board only constitutes a recommendation to the department, which then makes the final decision.

There can be no doubt that the state may not constitutionally continue an involuntary commitment without affording the individual due process of law. *O'Conner v. Donaldson*, 422 U.S. 563, 575 (1975); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). Due process basically requires that the state afford the opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Edldrige*, 424 U.S. 319, 333 (1976); *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 324-25, 204 N.W. 2d 13, 17 (1973). The question, therefore, is whether the procedures provided afford such an opportunity.

Examination of the two procedures for review of a sex crimes commitment reveals that the determination to discharge an individual is placed within the sole discretion of the department. As previously stated, respondent has shown no formalized procedures which are followed in the periodic examination provided by sec. 975.09. This examination is apparently merely a unilateral determination made by the institutional staff.

While procedure before the special review board offers more of an opportunity for the individual to be heard, two aspects of this procedure dilute whatever due process it affords. First, consideration for parole before the special review board is not required on a regular basis, and second, the decision is merely a recommendation to the department. Respondent asserts that the decision of the special review board is reviewable by certiorari, but such review of an advisory decision is meaningless. Therefore, we think that the present procedures fail to afford due process by not providing the opportunity to be heard at a meaningful time in a meaningful way.

A determination of what process is due must begin with consideration of the nature of the governmental function involved and the private interest which is effected. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). This court has held that the commitment procedure under the Sex Crimes Act is an independent proceeding, essentially different from penal sentencing. *Huebner v. State*, *supra* at 526, 147 N.W. 2d at 656. However, the court has also recognized that, unlike persons committed for mental illness under other laws of this state, a person committed under the Sex Crimes Act has been convicted of a sex related crime. *State ex rel. Farrell v. Stovall*, *supra* at 171, 207 N.W. 2d at 820. The purpose of commitment under the

Sex Crimes Law is primarily to protect the public from the commission of dangerous sex crimes and also to provide treatment for the offender. *State v. Torpy*, 52 Wis. 2d 101, 109, 187 N.W. 2d 858, 863 (1971).

The interest of the person committed is obviously in his discharge or parole from departmental control. His interest in release from commitment, once the basis for that commitment no longer exists, is clearly a valuable one, the determination for which calls for some orderly procedure.

The state's interests are many, the most important interest being that of the protection of persons from dangerous criminal and deviated acts of sexual psychopaths. The state also has an interest in detaining such afflicted perons in order to rehabilitate them. The state, however, has no interest in continuing indefinitely the commitment of a sex offender without some informal procedural guarantees.

In *State v. Goulette*, *supra*, this court held that the process which was due in parole determinations was a hearing with minimal due process or fair play standards and the keeping of some form of comprehensible and adequate record for the purposes of review. *Id.* at 216, 222 N.W. 2d at 627.

We believe that persons committed under ch. 975 are entitled to hearings which afford the same minimal requirements of due process. These minimal requirements include: (1) written notice of the hearing; (2) disclosure of the evidentiary material which will be considered by the hearing body; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses, in the absence of good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the

factfinders as to the evidence relied on and reasons for refusing parole or discharge. *Morrissey v. Brewer, supra* at 489.

It is difficult to determine how these minimal due process requirements should be implemented within the statutory framework of ch. 975. Although these requirements would most easily be met by procedure before the special review board, the problems of the lack of a requirement that the board review commitments on a regular basis and the board's decision constituting a mere recommendation still remain. Further, the special review board is only concerned with parole and not complete discharge. Due to these complications regarding the special review board, we think these minimal due process rights should be applicable to the periodic examination procedures provided under sec. 975.09, Stats., and that the decision of the department upon such examination is reviewable by the committing court upon writ of certiorari. This court has on several occasions construed deficient statutes to include constitutionally required provisions. *State ex rel. Farrell v. Stovall, supra; State ex rel. Matalik v. Schubert, supra; Huebner v. State, supra.*

Equal Protection

Petitioner also urges that persons committed under ch. 975 are denied equal protection because persons committed under other laws of this state are provided with greater rights of judicial review of their commitments.

Commitment of a person determined incompetent to stand trial is subject to semi-annual court review with full due process safeguards. *State v. Matalik, supra; State ex rel. Haskins v. County Courts*, 62 Wis. 2d 250, 264, 214 N.W. 2d 575, 582 (1974). Those persons committed following acquittal by reason of mental disease or defect

are entitled to a yearly judicial examination under sec. 971.17(2), Stats., which includes the right to jury trial under sec. 51.11, Stats. A person whose sex crime commitment has been extended beyond the maximum term under secs. 975.13 and 975.14, Stats., is also provided a semi-annual judicial review of his commitment. Sec. 975.15(3), Stats. Also, prisoners who, during their incarceration, are transferred to Central State Hospital due to mental illness are provided a yearly judicial examination under sec. 51.11 provided by sec. 51.21(3)(e), Stats.

In *State ex rel. Farrell v. Stovall, supra,* this court held that the determinations of the sex deviancy under ch. 975 and mental illness or deficiency under ch. 51 are so substantially identical as to require a reasonable basis or justification for a difference in rights afforded to persons committed under these similar statutes. *Id.* at 163-65, 207 N.W.2d at 816-17.

The fundamental determination to be made when considering a challenge based upon equal protection is whether there is an arbitrary discrimination in the statute or its application, and thus whether there is a rational basis which justifies a difference in rights afforded. *Harris v. Kelley*, 70 Wis. 2d 242, 251, 234 N.W. 2d 628 (1975). Thus, the question raised by this particular challenge of petitioner is whether any rational basis exists which justifies the disparity in the rights of judicial reexamination, not considering that which is required by the due process discussion above, afforded to those persons committed under ch. 975 and those committed under any other state law.

This question was previously considered by this court in *State ex rel. Farrell v. Stovall, supra* at 171-73, 207 N.W. 2d at 820-21. In that case, the court, relying on the decision

of the Federal District Court for the Western District of Wisconsin in *Hill v. Burke*, 289 F. Supp. 921 (W.D. Wis. 1968), *aff'd*, 422 F. 2d 1195 (7th Cir. 1970), held that a rational basis for this distinction could be found in the fact that those persons under ch. 975 have been convicted of a sex related crime.

Petitioner challenges this reliance upon *Hill v. Burke* arguing that in *State ex rel. Farrell* the court held that the criminal conviction would not serve as a rational basis for depriving a sex offender the right to jury trial at the initial commitment proceeding and recommitment proceeding after the maximum term has expired where such a right to a jury trial is provided for civil commitments. Thus, petitioner contends, the criminal conviction cannot be a rational basis for the denial of judicial reexamination for persons convicted under ch. 975.

In *Hill v. Burke*, however, the district court explained this apparent incongruity by stating:

> "The determination in the commitment proceedings is not whether the offender should be incarcerated at all, but whether he should be imprisoned or committed to the Department for treatment. On this issue the conviction of a crime does not come into play. It merely triggers the inquiry.
>
> "The issue here is whether the offender can challenge his confinement once it has been determined after a hearing where he shall be confined. On this issue the legislature could have reasonably concluded, and evidently has concluded, that the conviction of a crime is a factor in determining whether

> an offender can be released without endangering the public." *Hill v. Burke, supra* at 928.

Thus, the court concluded, while the criminal conviction may not be a basis for disparity in the procedures for determination of whether the individual needs specialized treatment, it may be the basis for a disparity in procedures for release of the individual into society.

Petitioner claims that the fact that he has been convicted of a crime should not deprive him of judicial reexamination because other commitments which are judicially reviewable, are also criminally related, such as commitment after acquittal by reason of insanity. Petitioner cites three cases to support his contention that there is no basis to distinguish between sex crimes commitments and commitments following acquittal by reason of insanity. *In re Andrews*, 334 N.E. 2d 15, 24-25 (Mass. 1975); *Waite v. Jacobs*, 475 F. 2d 392, 398 (D.C. Cir. 1973); *State ex rel. Kovach v. Schubert, supra.*

In re Andrews holds that the application of more stringent release provisions for persons committed as sexually dangerous than for prisoners committed as mentally ill violates equal protection. This decision was based on the holding in *Jackson v. Indiana, supra*, that committed persons charged with crimes could not be subjected to more stringent standards of release than were other committed persons. This extension of the rule in *Jackson v. Indiana* is, of course, not binding upon this court, and in fact in *State ex rel. Farrell, supra*, the court declined to hold that *Jackson* invalidated the distinctions in release provisions which exist between ch. 975 and ch. 51.

In *Waite v. Jacobs, supra*, petitioner claims, the court concluded there was no basis to distinguish between sex

crimes and insanity commitments. Close review of that decision, however, reveals that the court actually stated: *"Insofar as the initial commitment is concerned,* we can perceive little difference between [a person committed under the Sex Crimes Law] and an acquitee." (emphasis supplied). *Id.* at 398. Further reading of *Waite* indicates that the court was not concerned with release proceedings between the initial commitment and the expiration of the maximum term.

This court in *State ex rel. Kovach v. Schubert, supra,* also stated there was no significant rationale for distinctions among procedures for the various types of commitments. This statement, however, was made only during the analysis concerning initial commitment procedures.

Thus, we follow the conclusion in *State ex rel. Farrell v. Stovall, supra,* that the fact a person committed under ch. 975 has been convicted of a crime constitutes a rational basis for the disparity in the judicial reexamination procedures provided persons so committed and persons committed under other statutory provisions. Since there exists a rational basis which justifies this disparity, it is determined that petitioner is not denied equal protection.

In addition, this conclusion is fortified by the determination above as to the question of due process, for that determination provides for a due process hearing and review by certiorari on the question of discharge, and thus greatly decreases any disparity in the rights afforded to the various commitees [*sic*].

While the decision of the court in this case reverses the conclusion of the trial court that no violation of due process is present under the reexamination procedures of the Sex Crimes Act, the court does not find it necessary that the

writ of habeas corpus be granted or petitioner's motions be sustained in order to effectuate this reversal. Therefore, as to those results, the trial court is affirmed.

By the Court: Affirmed in part; reversed in part; remanded for entry of order consistent with the declaration of rights as per decision herein and ordering respondent to provide petitioner within a reasonable time a hearing under sec. 975.09, Stats., which meets the procedural requirements contained herein.

No. 75-503
August Term, 1976

State of Wisconsin ex rel. Barbara Lynn Terry,
Petitioner-Appellant,

v.

Edward F. Schubert,
Respondent.

Per Curiam (on motion for rehearing). On Page 493 of our original opinion, it is stated that

"This commitment to the department practically amounts to a sentence of the maximum term for the crime committed by the defendant."

This language is withdrawn.

On Page 497 it is stated that

> "In *State v. Goulette, supra,* this court held that the process which was due in parole determination was a hearing with minimal

due process or fair play standards and the keeping of some form of comprehensible and adequate record for the purposes of review. *Id.* at 216, 222 N.W. 2d at 627.

"We believe that persons committed under ch. 975 are entitled to hearings which afford the same minimal requirements of due process. These minimal requirements include: (1) written notice of the hearing; (2) disclosure of the evidentiary material which will be considered by the hearing body; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses, in the absence of good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the factfinders as to the evidence relied on and reasons for refusing parole or discharge. *Morrissey v. Brewer, supra* at 489."

This language is withdrawn and in its place the following is substituted:

In *State v. Goulette, supra,* this court noted that in parole grant determinations minimal due process requirements or fair play standards should be provided and that some form of comprehensive and adequate record should be kept and provided for purposes of review. *Id.* at 216, 222 N.W. 2d 627.

We believe that persons committed under ch. 975 are also entitled to hearings which afford minimal due process. These minimal requirements for a reexamination of a sex crimes commitment between the time of initial commitment and the expiration of the maximum term include: (1) written notice of the hearing; (2) disclosure of the evidentiary material which will be considered by the hearing body; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine witnesses, in the absence of good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the factfinders as to the evidence relied on and reasons for refusing discharge. *See Morrissey v. Brewer, supra* at 489.

Motion for rehearing denied without costs.

State of Wisconsin Dodge County Circuit Court

STATE OF WISCONSIN EX REL.
BARBARA LYNN TERRY,
Petitioner,
v.
DR. EDWARD F. SCHUBERT,
Respondent.

ORDER

This proceeding having been appealed to the Wisconsin Supreme Court, and a decision having been filed on November 30, 1976, and modified on March 1, 1977, remanding the proceeding to this court for an entry of an

order consistent with the declaration of rights undertaken in the Wisconsin Supreme Court decision,

IT IS HEREBY ORDERED that, within thirty (30) days from the date of this order, petitioner is to be afforded a hearing to ascertain whether there is any continuing need for custody and treatment.

IT IS FURTHER ORDERED that the hearing to be afforded petitioner shall, as a minimum, include the following procedures:

1) Written notice of the hearing;

2) Disclosure of the evidentiary material which will be considered by the hearing body;

3) Opportunity to be heard in person and to present witnesses and documentary evidence;

4) The right to confront and cross-examine witnesses, in the absence of an express statement setting forth good cause for not allowing confrontation;

5) A neutral and detached hearing body;

6) A written statement by the fact-finders setting forth the evidence relied upon and the reasons for their decision.

IT IS FURTHER ORDERED that if petitioner is not discharged at the hearing ordered as aforesaid, he shall be afforded hearings of a like nature as frequently as the Department of Health and Social Services considers desirable, but in no event, shall the interval between hearings exceed one year.

Dated this 12 day of April, 1977.

BY THE COURT:

/s/ Henry G. Gergen, Jr.
The Honorable Henry G. Gergen, Jr.,
Circuit Judge for the 13th Judicial Circuit

approved as to form:

/s/ James H. Petersen 4-11-77
James H. Petersen

OTHER WISCONSIN STATUTES

975.01 MANDATORY COMMITMENT FOR PRESENTENCE EXAMINATION. If a person is convicted under s. 940.225(1) to (3) or under s. 939.32 for attempting to violate s. 940.225(1) to (3), the court shall commit the person to the department of health and social services for a presentence social, physical and mental examination. The court and all public officials shall make available to the department upon its request all data in their possession in respect to the case.

975.02 DISCRETIONARY COMMITMENT. (Omitted.)

975.03 TRANSPORTATION. (Omitted.)

975.04 REPORT OF EXAMINATION. (1) Upon completion of the examination, but not later than 60 days after the date of the commitment order, a report of the results of the examination and the recommendations of the department shall be sent to the court.

(2) Commitments to the department under this chapter for presentence examination are terminated when the court orders the defendant returned to court by the proper county authorities and the department gives custody of him to such authorities or when following receipt by the

court of the department's report and recommendations, he is brought before the court for any reason; or when during the presentence examination he absconds and the court issues a warrant for his arrest.

975.05 SENTENCE IMPOSED. If the department does not recommend specialized treatment for the defendant's mental and physical aberrations, the court shall make disposition in accordance with ch. 54 or sentence the defendant as provided by law.

975.06 COMMITMENT TO THE DEPARTMENT. (1)(a) If the department recommends specialized treatment for the defendant's mental or physical aberrations, the court shall order a hearing on the issue of the need for specialized treatment unless such hearing is expressly waived by the defendant. The hearing shall be conducted by the court or as provided in par. (b). The court may consider any department rule established in accordance with ch. 227 establishing criteria for recommending specialized treatment. The defendant shall be afforded the opportunity to appear with counsel; process to compel the attendance of witnesses and the production of evidence; and a physician, or clinical psychologist of defendant's choosing to examine the defendant and testify in defendant's behalf. If unable to provide counsel or expert witness, the court shall appoint such to represent or examine the defendant.

(b) The hearing shall be to a 12-person jury, unless the defendant requests a 6-person jury or waives a jury. The procedure shall be substantially like a jury trial in a civil action. The judge may instruct the jurors in the law. No verdict shall be valid or received unless agreed to and signed by five-sixths of the jurors. At the time of ordering a jury to be summoned, the court shall fix the date of hearing, which date shall not be less than 30 days nor more

than 40 days after the demand for the jury was made. The court shall submit to the jury the following form of verdict: STATE OF WISCONSIN . . . . County Members of the Jury:

Do you find from the evidence that the defendant . . . . (Insert Name) . . . . is in need of specialized treatment? Answer "Yes" or "No."

(2) If, upon completion of the hearing as required in sub. (1), it is found that the defendant is in need of specialized treatment the court shall commit the defendant to the department. The court may stay execution of the commitment and place the defendant on probation under ch. 973 with a condition of probation that the defendant receive treatment in a manner to be prescribed by the court. If the defendant is not placed on probation, the court shall order the defendant conveyed by the proper county authorities, at county expense, to the sex crimes law facility designated by the department.

(3) Probation under sub. (2) shall be construed as a commitment to the department for the purposes of continuation of control as provided in this chapter.

(4) If, upon the completion of the hearing required in sub. (1), it is found that the defendant is not in need of such specialized treatment the court shall sentence the defendant as provided in ch. 973.

(5) If records of the department are required for any hearing under this chapter, they shall be made available upon a subpoena directed to the coordinator of the special review board of the department, who may respond in person or designate an agent to produce the records of the department.

(6) Persons committed under this section who are also encumbered with other sentences, whether concurrent with or consecutive to the commitment, shall be received or remain at the sex crimes facility designated by the department. Such facilities may be regarded as state prisons for the purpose of beginning the other sentences, crediting time served on them, and computing parole eligibility dates.

975.07 THE EFFECT OF APPEAL FROM A JUDGMENT OF CONVICTION. (Omitted.)

975.08 NOTICE OF COMMITMENTS; TREATMENT, TRANSFER, USE OF OTHER FACILITIES. (1) If a court commits a person to the department under s. 975.06 it shall at once notify the department of such action in writing.

(2) The department shall then arrange for his treatment in the institution best suited in its judgment to care for him. It may transfer him to or from any institution to provide for him according to his needs and to protect the public. The department may irrespective of his consent require participation by him in vocational, physical, educational and correctional training and activities; may require such modes of life and conduct as seem best adapted to fit him for return to full liberty without danger to the public; and may make use of other methods of treatment and any treatment conducive to the correction of the person and to the prevention of future violations of law by him.

(3) The department may make use of law enforcement, detention, parole, medical, psychiatric, psychological, educational, correctional, segregative and other resources, institutions and agencies, public or private, within the state. The department may enter into agreements with public officials for separate care and special treatment (in existing institutions) of persons subject to the control of the department under this chapter. Nothing herein contained shall give the department control over existing institutions or agencies not already under its control, or give it power to make use of any private agency or institution without its consent.

(4) Placement of a person by the department in any institution or agency, not operated by the department, or his discharge by such institution or agency, shall not terminate the control of the department over him. No person placed in such institution or agency may be released

therefrom except to the department or after approval of such release by the department.

975.09 PERIODIC EXAMINATION. The department shall make periodic examinations of all persons within its control under s. 975.06 for the purpose of determining whether existing orders and dispositions in individual cases should be modified or continued in force. These examinations may be made as frequently as the department considers desirable and shall be made with respect to every person at intervals not exceeding one year. The department shall keep written records of all examinations and of conclusions predicated thereon, and of all orders concerning the disposition or treatment of every person under its control. Failure of the department to examine a person committed to it or to make periodic examination shall not entitle him to a discharge from the control of the department, but shall entitle him to petition the committing court for an order of discharge, and the court shall discharge him unless it appears in accordance with s. 975.13 that there is necessity for further control.

975.10 PAROLE. Any person committed as provided in this chapter may be paroled if it appears to the satisfaction of the department after recommendation by a special review board, appointed by the department, a majority of whose members shall not be connected with the department, that he is capable of making an acceptable adjustment in society.

975.11 DURATION OF CONTROL. The department shall keep every person committed to it under s. 975.06 under its control and shall retain him, subject to the limitations of s. 975.12 under supervision and control, so long as in its judgment such control is necessary for the protection of the public. The department shall discharge

any such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public, but no person convicted of a felony shall, without the written approval of the committing court, be discharged prior to 2 years after the date of his commitment.

975.12 TERMINATION OF CONTROL. (1) Every person committed to the department under this chapter who has not been discharged as provided herein shall be discharged at the expiration of one year or the expiration of the maximum term prescribed by the law for the offense for which he was committed subject to sub. (2) whichever is greater, unless the department shall have acted under s. 975.13 to continue him subject to its control. For the purpose of this subsection, sentence shall begin at noon of the day of the commitment by the court to the department.

(2) All commitments under s. 975.06 for offenses committed after July 1, 1970, shall be subject to ss. 53.11 and 53.12. If the department is of the opinion that release on parole pursuant to s. 53.11(7)(a) would be dangerous to the public, it shall either make an order directing that the person remain subject to its control or make an order suspending the provisions of s. 53.11(7)(a) and in either case shall make application to the committing court for a review of that order proceeding as provided in this chapter.

975.13 CONTINUANCE OF CONTROL; ORDER AND APPLICATION FOR REVIEW BY THE COMMITTING COURT. If the department is of the opinion that discharge of a person from its control at the time provided above would be dangerous to the public for reasons set forth in s. 975.14, it shall make an order directing that he remain subject to its control beyond that period; and shall make application to the committing court for a review of that order at least 90 days before the time of discharge stated.

975.14 ACTION OF COMMITTING COURT UPON APPLICATION FOR REVIEW; REASONS FOR CONTINUANCE OF CONTROL BY THE DEPARTMENT. (1) If the department applies to the committing court for the review of an order as provided in s. 975.13 the court shall notify the person whose liberty is involved, and, if the person is not sui juris, the person's parent or guardian as practicable, of the application, and shall afford the person opportunity to appear in court with counsel and of process to compel the attendance of witnesses and the production of evidence. The person may have a physician or clinical psychologist of the person's choosing examine the person and the medical records in the institution to which confined or at some suitable place designated by the department. If unable to provide counsel, the court shall appoint counsel to represent the person. Section 975.06(1) shall govern the procedure of the hearing.

(2) If, after a hearing, it is found that discharge from the control of the department of the person to whom the order applies would be dangerous to the public because of the person's mental or physical deficiency, disorder or abnormality the court shall confirm the order. If it is found that discharge from the control of the department would not be dangerous to the public for the causes stated, the court shall order that the person be discharged from the control of the department at the time stated in the original commitment.

975.15 REVIEW BY COURT OF SUBSEQUENT ORDERS OF THE DEPARTMENT. (1) When an order of the department is confirmed as provided in s. 975.14 the control of the department over the person shall continue, but unless he is previously discharged, the department shall within 5 years after the date of such confirmation make a new order and a new application for review thereof in accordance with this chapter, subject to s. 57.072. Such orders and applications may be repeated as often as in the

opinion of the department it may be necessary for the protection of the public.

(2) Every person shall be discharged from the control of the department at the termination of the periods stated in sub. (1) unless the department has previously acted therein as required, and shall be discharged if the court fails to confirm the order as provided in s. 975.14.

(3) During any such period of extended control, but not oftener than semiannually, a person may apply to the court for a reexamination of his mental condition and the court shall fix a time for hearing the same. The proceeding shall be as provided in s. 51.20(17).

975.16 APPEAL FROM JUDGMENT OF COMMITTING COURT. (1) If, under this chapter the court affirms an order of the department, the person whose liberty is involved may appeal to the proper appellate court for a reversal or modification of the order. The appeal shall be taken as provided by law for appeals to said court from the judgment of an inferior court.

(2) At the hearing of an appeal the appellate court may base its judgment upon the record, or it may upon its own motion or at the request of either the appellant or the department refer the matter back for the taking of additional evidence.

(3) The appellate court may confirm the order of the lower court, or modify it, or reverse it and order the appellant to be discharged.

(4) Pending appeal the appellant shall remain under the control of the department.

975.17 VOLUNTARY ADMISSION TO DIAGNOSTIC INSTITUTIONS; TREATMENT. (Omitted.)

975.18 ESTABLISHMENT OF REGULATIONS. The department may promulgate rules concerning parole, revocation of parole, supervision of parolees, and any other matters necessary for the administration of this chapter.